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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 689

MONON RAILROAD,

Appellant,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

BRIEF OF MONON RAILROAD IN OPPOSITION TO MOTION TO AFFIRM.

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MONON'S CONTENTIONS.

Monon's Jurisdictional Statement contended:

1. That the District Court erred in holding that Monon was not entitled to judicial review because there will be a later 5(2) (49 U. S. C. 5(2)) proceeding for the purpose of approving the completion of the acquisition authorized herein, at which time Monon can raise its present objections (App. 26a, 27a); and

2. That the Commission, in authorizing L&N to acquire the Evansville Line of the C&EI, failed to make the required basic findings as to Monon's evidence of competitive damage to it, which damage, if permitted, would violate the public interest requirement of 5(2).

APPELLEES' CONTENTIONS.

Appellees[1] contend that the Commission's determination is not reviewable because the final acquisition of the Evansville Line for numerous hypothetical reasons might not be consummated. They also contend that Monon, although denied any consideration of its evidence herein, will be adequately and fully protected in a later hearing. It is argued that if the Commission does not afford Monon a hearing in the later 5(2) proceeding (L&N, p. 14) or if Monon "feels aggrieved", Monon can then ask for judicial review. It is claimed that the doctrine of *res judicata* does not apply. These contentions ignore the fact that the Commission determined that public interest required the acquisition of the Evansville Line by L&N and that this final determination of the basic issue here involved cannot be again reviewed save in this court. L&N contends (p. 5) that adequate findings were made as to Monon's evidence.

Significantly, not one appellee attempts to deny the gravity of the damage to Monon resulting from such acquisition.

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1. The Motions to Affirm of Louisville and Nashville Railroad, the Interstate Commerce Commission and Leon Leighton are referred to herein as "L&N", "Com." and "Leighton", respectively.

I.

MONON IS ENTITLED TO JUDICIAL REVIEW HEREIN.

A.

The Public Interest Issue Had to Be and Was Decided.

Appellees do not dispute and in fact stress that public interest requires that the Commission authorize acquisition of the Evansville Line by L&N and that such determination is final (Com., p. 14; Leighton, p. 14, Footnote 12). To do otherwise would jeopardize the very authority eagerly sought by L&N and also by MoPac since a careful reading of the order shows that MoPac's rights are conditioned on the L&N acquisition.[2]

The Commission could not authorize said acquisition until and unless it found the acquisition was in the public interest as required by 5(2) (b).[3] The Commission emphatically found that the L&N acquisition was in the public interest (App. 57a). The District Court recognized that the

2. The contrary contentions (L&N p. 13; Com., p. 11; Leighton p. 14) cannot be sustained. The authority granted MoPac was expressly conditioned on acquisition of the Evansville Line by L&N (App. 67a) through compulsory negotiations (App. 57a). To assure such final acquisition, numerous requirements were imposed (App. 67a, 68a, 92a). If the public interest issue is open as to one adversary, Monon, in the later 5(2) proceeding, of necessity it must be also open as to the other adversary, L&N. If it is open as to L&N, it must remain open as to MoPac because without the L&N (Dixie) conditions, the Commission apparently would not have found control of the C&EI (Eastern) by MoPac to be in the public interest (App. 49a, ¶2).

3. 5(2) (b) provides:

"• • • If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction • • • will be consistent with the public interest, it shall enter an order approving and authorizing such transaction upon the terms and conditions and with the modifications so found to be just and reasonable: • • •."

Commission was required to and did make such a finding (App. 26a). This determination, which was required under 5(2), of necessity rejected Monon's contention that such determination was against public interest because of the resultant damage to Monon.

B.

Under Appellees' Theory, No 5(2) (b) Order Could Be Reviewed.

Appellees would deny judicial review to Monon because the order is "iffy" (Leighton, p. 15). This contention ignores the fact that all orders under 5(2) (b) are only permissive in granting approval and cannot be mandatory. *St. Joe Paper Company* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 305, 306, 309, 310. The Court is well aware that many Commission orders are permissive only; yet in all such cases, even though the results envisioned by those orders may never come to pass, such orders are nevertheless fully reviewable when issued. Under appellees' argument, a court could not review 5(2) (b) orders until performance had been completed, which, of course, in the present case would make the review not a review of the order, but rather would impose on the reviewing court the impossible task of seeking to unravel an accomplished fact.

C.

Appellees' Authorities.

Significantly, the Commission's brief cites no authorities to sustain its contentions except the lower court opinion herein and an excerpt from the Commission Report in the Penn Central Merger proceeding (Com., p. 14). The L&N's

only argument (L&N, p. 13) is that Monon is asking this court to prejudge the later 5(2) proceeding.[4]

The authorities cited by Mr. Leighton involve situations where the agency process had not been completed. In *Eccles* v. *Peoples Bank* (1948), 333 U. S. 426 (Leighton, p. 15), the Federal Reserve Board unanimously voted that "public interest" called for no action (431) concerning a purchase of stock which could have been in violation of an express condition imposed upon Peoples Bank as part of its admission to the system. Despite such disavowal, a declaratory judgment was sought and denied. Also, enforcement of the board order would require a further hearing (429).

Likewise, *American Air Lines* v. *Civil Aeronautics Board*, 178 Fed. 2d 903 (1949) (C. A. 7) (Leighton, p. 15) is not in point. There, as part of other legal issues not pertinent here, the Civil Aeronautics Board (CAB) directed Railway Express Agency (Railway) to negotiate the revision of certain agreements existing between Railway and certain air carriers in the manner specified by CAB and to submit any revised agreements to CAB for approval within six months. Railway did not join in the appeal of the carriers who attacked this CAB directive on numerous grounds.

The controlling distinction between American Airlines and the case at bar is that only future negotiations were there involved which, when completed, would require subsequent review by CAB; while here, the ultimate question of the acquisition of the Evansville Line by the L&N has been approved by the Commission as in the public interest. Here, the Commission acknowledged (App. 57a) that mere negotiations could be carried on by the railroads without Commission approval. By contrast, the acquisition of the

4. In the lower court, L&N joined Monon in contending that this matter was final and ripe for review, and further contended that MoPac was seeking a trial *de novo* as to the L&N conditions.

Evansville Line by the L&N, an acquisition which would be otherwise illegal under 5(4),[5] has been approved and as a necessary prerequisite thereto the Commission has made a final determination that the acquisition is in the public interest. In *American Airlines*, until the negotiations were completed and were reviewed by CAB, the controversy, if any, that might later develop could not even be defined. This is sustained by the court's quotation from another case on page 910, where it is stated:

> "* * * It may be a step, which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as the consummation of the administrative process. (Citations) * * *"

The court there recognized that where some legal relationship has been fixed, such as here, where the controlling determination has been made, viz., that the acquisition is in the public interest despite a threatened loss of $1,800,000 per year to Monon, such a determination is reviewable. It cannot be stated here, as it was there, that the Monon has lost nothing by this determination (pp. 910-911).

Sunray Mid-Continent Oil v. *Federal Power Commission*, 270 Fed. 2d 404, involved a hypothetical question as to Sunray's rights if it should discontinue its service, which it had no intention of doing. In *Continental Bank and*

5. 5(4) (49 U. S. C.) provides:
"It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, * * *."

Trust Company v. *Martin,* 303 Fed. 2d 214 (Leighton, p. 16), the Federal Reserve Board issued an order directing the plaintiff therein to increase its capital and surplus by $1,500,000; however, to enforce this order, it was first necessary to bring an action under Section 9 (12 U. S. C. 327), which expressly provides for a hearing. The court held until such hearing the Board had no power to take action and "no definitive legal consequences" arose. Here, the order being permissive is self executing when entered. In *Continental,* the order had to be mandatory in nature requiring enforcement provisions to make it effective. Without a further hearing, there was no enforcible order.

If the public interest issue is open to Monon in the later proceeding, then the order is not final as to anyone (ante, footnote 2, p. .....), and in accordance with Mr. Leighton's authorities, the whole proceedings, including the later 5(2) proceedings, should be determined before any judicial review can be sought.[6] However, the Commission has not indicated that Monon can retry the public interest issue. In fact, its order demonstrates that the public interest issue has been determined when it held (App. 92a) "Exceptions and arguments not specifically discussed herein have been considered and found to be without merit."[7]

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6. The Examiner so indicated in stating (Examiner's Report, p. 123):

> "• • • the proposals of Dixie Line (L&N) would prevent the authorization herein *from taking effect* unless and until the demands of Dixie Line are satisfied." (Italics ours.)

7. An attempt is made to assure Monon that it can again retry the public interest issue by referring to a gratuitous statement in *Pennsylvania Railroad Company—Merger—New York Central Railroad Company,* 327 I. C. C. 475, 540 (Com., p. 14; Leighton, p. 16, footnote 16) to the effect that Monon should address its complaint herein to the later 5(2) proceeding rather than in that merger proceeding. Monon is unable to determine whether this statement is an effort to bolster the omissions here or whether it was a means of eliminating Monon from that merger case. Obviously, the Commission could not retain jurisdiction on the public interest issue herein by so stating in a collateral proceedings.

D.

Monon's Counter Authorities.

Unlike courts which normally dispose of one controversy, administrative agencies have continuing supervision over regulated industries involving recurring and often interrelated orders. Practicality and justice necessitate that an agency order from which legal consequences will flow should be reviewable. In *Rochester Telephone Corporation* v. *United States* (1939), 307 U. S. 125, an order merely holding that a telephone company was under an agency's jurisdiction was held reviewable. In *Pennsylvania Railroad Co.* v. *United States*, 363 U. S. 202, where the Commission had given an advisory opinion to the Court of Claims as to the validity of certain freight charges, this court held such an opinion was reviewable (205). In *Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 512, it is stated:

> "• • • Here the orders constituted 'an unequivocal assertion of power' to regulate rates and service. Indeed they involve something more than a mere threat to apply the regulatory plan in its later phases. *They represent the actual application of that plan in its initial stage.* In such a situation appellant was not required to await a further regulatory order before contesting the Commission's jurisdiction. • • •" (Italics ours.)

Also, *C. B. S.* v. *United States*, 316 U. S. 407, 417, 418; *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 18 and 19.

Even in court proceedings, the rule of finality is applied despite ancillary or tributary proceedings to follow. *Brown Shoe Company* v. *United States*, 370 U. S. 294, 308, held a lower court decree to be final in an antitrust action where the lower court retained jurisdiction to supervise the plan of divestiture. Here, the ultimate result is the

divestiture of the Evansville Line by the C&EI and the acquisition thereof by the L&N. There, as here, the appellant attacked the divestiture (308, 309) and not the details or plan of such divestiture. The court held that the decree still to be entered necessitated careful negotiation and formulation requiring buyers and bankers to accomplish the forced sale, and observed "* * * This process does not take place in a vacuum, * * *". (309) The highly comparable situation in *Brown Shoe* to the case at bar is distinguished only by the fact that here the injury to Monon is complete regardless of the details of the subsequent sale or even gift of the Evansville Line to the L&N while there *Brown* had a direct financial interest in the later sale. It is in this proceeding where the damage will be done to the Monon and where the public interest issue is involved.

E.

Res Judicata Prevents the Later Modification of the Order Herein.

Only the Commission still contends that the doctrine of *res judicata* does not apply, a point upon which the prematurity argument was bottomed in the lower court. When Commission authority is granted to a railroad in an adversary proceedings, the doctrine of *res judicata* applies and the Commission is powerless to later modify such authority. *United States* v. *Seatrain Lines*, 329 U. S. 424, 432, 433, reaffirmed in *Civil Aeronautics Board* v. *Delta Airlines* (1961), 367 U. S. 316, 328. The Commission is without the power to later change its order herein approving the L&N acquisition as being in the public interest.

F.

Protection Should Be Granted Herein to Monon.

5(2) (b) specifically requires that the Commission shall impose just and reasonable terms before approving the transaction as in the public interest. If protection to the Monon now being proffered (Com., p. 14; L&N, p. 14; Leighton, p. 15) is anything more than counsel's post hoc rationalizations to sustain the present order, such protection should be spelled out herein as a prerequisite to the finding that such acquisition is in the public interest. No fact nor reason is advanced why the protection now indicated was not afforded Monon herein instead of a later proceeding where the Monon may not even receive a hearing.

G.

Monon Is Not Seeking Prejudgment—It Has Already Been Judged.

Monon is not asking prejudgment of any later 5(2) hearing if any in fact is granted to the Monon—it is seeking review of a determination that has been made herein which is of utmost gravity to Monon. Further, if denied relief herein, Monon will be irretrievably prejudged in any later hearing. In *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327, Fetzer, and then Ashbacker, applied for a radio broadcasting permit for the same location. The Communications Commission granted Fetzer's application without a hearing on Ashbacker's application. Ashbacker appealed. This court, in reversing, held (332) that legal theory is one thing, practicalities are different. The court further stated (334):

> "* * * While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application."

There, Ashbacker was in a sense a bystander; here, Monon was an active participant in the proceedings and should not be forced to retry this case in the hope of overcoming the almost impossible burden of the prejudgment herein.

II.

NO FINDINGS WERE MADE AS TO MONON.

Only the L&N's brief now contends that adequate findings were made as to the Monon. It is inconsistent to first argue that the public interest issue has not been determined as to Monon and will be determined in the later 5(2) proceedings and to then contend that adequate findings were made as to Monon herein. If adequate findings were made Monon is entitled to review of those findings.

L&N cannot point to one finding where the Commission considered Monon's evidence and explained why public interest required the L&N acquisition despite the damage to Monon. By contrast, the evidence of the other competitive railroads was minutely examined in the report (App. 49a to 54a, *Diversion of Traffic*).

The majority opinion refused to pass upon the lack of findings (App. 26a). Chief Judge Campbell flatly stated that Monon's evidence was ignored (App. 33a). Seizing the latter statement, L&N attempts to show that Monon's evidence was considered because some excerpts of Monon's evidence as recited in the Examiner's Report were included as an appendix to the Commission's Report (L&N, p. 6).[8] Monon is entitled to more than arguments that its evidence was considered—Monon is entitled to findings as to the issue involved. Further, the Examiner denied the L&N the right to purchase the Evansville Line (Examiner's Report 124; Commission's comment App. 67a). Therefore,

8. Later, L&N characterized these excerpts as the Commission's report.

no findings as to public interest were made by the Examiner and none are available for adoption by the Commission.

L&N, ignoring the evidence (including L&N's study showing a loss to Monon of $567,000 per year in revenue), contends that there are five factors which were the basis for the Commission's final conclusion (L&N pp. 7 to 9). These factors are not findings on Monon's evidence and have no application to Monon. They, in fact, affirmatively demonstrate the damage that will result to Monon.[9]

All these conjectural arguments of counsel are not findings and serve to emphasize the failure of the Commission to make essential findings.

> "• • • If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled

9. As to factor 1, there is no electronic yard at Louisville. (The Commission erroneously so reported (App. 64a). The Examiner stated only that it was contemplated (App. 161a)). Monon now receives at Louisville for shipment to Chicago railroad cars from the L&N which have been gathered from its large system. Obviously, L&N would not continue to deliver such cars to Monon when it has its own direct line to Chicago because of the loss of revenue and the extra expense. This is true regardless of the yard in Louisville. (Please compare Examiner's Report, 94, 95.) As to factor 2, because over 90 per cent of the traffic is shipper routed, this is the very reason why Monon will lose traffic to a faster single line haul. As to factor 3, no explanation is given of how Monon, half the size of the C&EI, which is admittedly a weak railroad, could possibly have any retaliatory power against L&N. As to factor 4, traffic conditions merely afford Monon an opportunity to compete but Monon will be unable to compete. Factor 5 is not quoted in full. When the part omitted is supplied, viz. "Particularly those (railroads) serving territories west and north of Chicago" (App. 64a), it is demonstrated that Monon will be precluded from all this traffic to Chicago in which it is now participating. Undoubtedly, this is some of the traffic which L&N frankly admits it is seeking to recapture by acquiring the line (App. 59a). (Also compare Leighton brief, pp. 11 and 12, showing plight of C&EI as a small railroad.)

> to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' * * *'' *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 196, 197. Also, *Burlington Truck Lines* v. *U. S.* (1962), 371 U. S. 156, 167, et seq.

This rule applied to Commission orders long before the Administrative Procedure Act of 1946. *Baltimore and Ohio Railroad Co.* v. *United States* (1924), 264 U. S. 258, 265 (Brandeis); *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* (1935), 294 U. S. 499, 510, 511 (Cardozo).

CLARIFICATION OF CERTAIN OF APPELLEES' STATEMENTS.

Like L&N (L&N, p. 5), Monon also had shippers and civic organizations who testified to their deep concern if Monon's services were to end or were further curtailed (Examiner's Report 96). The Commission order ''established the immediate right'' (Monon J. S., p. 9) to the temporary use of the Evansville Line by L&N pending the acquisition (App. 68a). Appellees (Com., p. 13; L&N, p. 10) do not deny that the right has been established but argue about the details preceding the use by L&N, which details could be quickly completed by agreement of the parties.[10]

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10. The affidavit filed in the District Court in support of L&N's disavowal to immediately use the line was limited to ''during the pendency of the case in the Federal District Court''. Monon accepts L&N's present disavowal (L&N, p. 10).

CONCLUSION.

Because the Commission's authority is only permissive, mergers and control proceedings must necessarily originate with the railroads involved resulting in a haphazard pattern. Despite the protests of the small railroads having little attraction to other railroads for merger purposes, the mergers are approved as in the public interest because of the valuable benefits to the larger railroads involved; however, in the process, the revenues of the small railroads are eroded with ultimate abandonment or reduced service as their fate resulting in communities and shippers being deprived of service or adequate service.[11]. With the many railroad mergers pending, this problem is national in scope. The procedures of the Commission should encompass methods to prevent the raiding of the revenues of such small railroads as a concomitant to such mergers. At the very least, the Commission should afford to these small railroads every legal right contemplated by Congress. It is respectfully contended that Monon is entitled to the

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11. The predicament of the Monon is graphically set forth in *Penn-Central Merger Proceeding,* 327 I. C. C. 475, at pages 537 to 540. The trackage rights under (d) (539), which C&O agreed to give to Monon, were denied to Monon by the hearing examiner in Finance Docket No. 23918 on October 25, 1966. As to (a) (538), *Monon Railroad Construction and Operation,* 324 I. C. C. 208, that proceeding involved two docks, one at each end of the Monon Railroad, to connect the Ohio River and the Great Lakes for which the Commission made funds available in Finance Docket No. 21551 (p. 211) through a guaranteed loan. When Monon sought authority to connect the docks with its main line, nine railroads first appeared and objected. As stated in one of the dissents (240), this was a unique service not being furnished. Despite the fact that after five years of operation the projected volume of revenue would be less than one-quarter of one per cent of the gross revenues of only four out of the nine protesting railroads (239), Monon was denied permission to connect to the dock facilities on the ground that such operation would weaken the competitive carriers (236).

minimal protection here of an adequate consideration by the Commission of its evidence and adequate findings thereon. Probable jurisdiction should be noted.

Respectfully submitted,

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